STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND JOHN MAY, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED October 2, 2003
v	No. 240312 Wayne Circuit Court
DAVID MAYE and KEVIN NELSON, Defendants-Appellees/Cross-Appellants.	LC No. 98-824377-NO

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Plaintiff sued defendant police officers, contending that they were grossly negligent in shooting him after he committed an armed robbery and fled from the police. The jury returned a verdict of no cause of action. Plaintiff subsequently moved for a new trial. Although the court determined that one of the jury's findings was against the great weight of the evidence, it nevertheless concluded that the error was harmless and denied plaintiff's motion. Plaintiff appeals and defendants cross-appeal as of right. We affirm.

Using a BB gun, plaintiff robbed a gas station. After a high-speed police chase, plaintiff's car became disabled and defendants attempted to arrest him. According to defendants, plaintiff pointed a gun at defendant Nelson, who shot toward plaintiff three times. Defendant Maye, believing that plaintiff was shooting at defendant Nelson, also began shooting at plaintiff. Plaintiff maintained that he did not have the gun in his hand at any time during the incident. The jury found that defendant Nelson committed a battery against plaintiff, but was not grossly negligent.[1] The jury found that Maye committed a battery and was grossly negligent, but that he was not the proximate cause of plaintiff's injuries.[2]

[1] At plaintiff's insistence, the jury was instructed that plaintiff was required to prove that defendants had committed a battery and were grossly negligent.

[2] Although the special verdict form indicated that, having reached those conclusions, the jury was not required to complete the remainder of the verdict form, the jury nonetheless determined that plaintiff was negligent and that his negligence was a proximate cause of his injuries. The (continued…)

Plaintiff contends that the trial court erred in denying his motion for a new trial because the jury's finding that defendant Nelson committed a battery cannot be reconciled with its finding that he was not grossly negligent. We review a trial court's decision regarding a motion for a new trial for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003).

As noted by defendants, in *Kelly v Builders Square, Inc*, 465 Mich 29, 38; 632 NW2d 912 (2001), our Supreme Court ruled that an inconsistency in a jury verdict in itself is not a legal basis for granting a new trial. The *Kelly* Court explained that the grounds for granting a new trial are codified at MCR 2.611(A)(1), which "provides the only bases upon which a jury verdict may be set aside." *Kelly, supra* at 38. The rule "does not identify inconsistency or incongruity as a ground for granting a new trial." *Id*. at 39. Thus, the *Kelly* Court held that the trial court abused its discretion by granting a new trial on the basis of an inconsistent verdict without finding a basis in MCR 2.611(A)(1). *Id.*

Here, in light of the *Kelly* decision, we are not persuaded that the trial court could have granted plaintiff's motion for a new trial based solely on the inconsistency in the verdicts. Regardless, even if inconsistency could justify a new trial, we would nevertheless reject plaintiff's assertion that the jury's findings in the instant matter were inconsistent. The trial court instructed the jury that a "battery" is "the willful or intentional touching of a person against that person's will by an object or substance put into motion by a person." Although the jury was later instructed that a police officer commits a battery where he or she used excessive force to accomplish an arrest, the jury was not instructed that *the only way* a police officer commits a battery is by using excessive force to accomplish an arrest. Thus, because defendant Nelson testified that he intentionally shot plaintiff, there was evidence for the jury to find that defendant Nelson battered plaintiff without even addressing the issue of the excessiveness of the force. In other words, the jury instructions allowed the jury to find that defendant Nelson battered plaintiff without the jury necessarily finding that defendant Nelson used excessive force in arresting plaintiff. Accordingly, the trial court did not err in rejecting plaintiff's contention that the verdicts were inconsistent. Consequently, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Plaintiff also contends that he was entitled to a new trial because a finding that defendant Nelson was not grossly negligent was against the great weight of the evidence. Neither the trial court, nor this Court, should rule that a verdict is against the great weight of the evidence unless "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Campbell, supra* at 193. Thus, although the trial court did not rule on this issue, we apply the same standard in determining whether an error requiring reversal occurred.

(…continued)

jury allocated fault at zero percent for defendant Nelson, thirty-two percent for defendant Maye, and sixty-eight percent for plaintiff. The jury also found that plaintiff had an impaired ability to function due to the influence of a controlled substance and that plaintiff was fifty percent or more the cause of the event that resulted in his injuries as a result of an impaired ability to function due to the influence of a controlled substance.

Here, as noted above, the jury found that defendant Nelson committed a battery, but was not grossly negligent. The trial court instructed the jury that "gross negligence" was "conduct . . . that is so reckless that it demonstrates a substantial lack of concern for whether an injury will result." Defendant Nelson testified that he was "absolutely positive" that plaintiff pointed a gun at him. Defendant Nelson's testimony suggested that, in light of the circumstances, he was justified in deciding to shoot at plaintiff. Thus, there was ample evidence for the jury to find that defendant Nelson's conduct in shooting plaintiff did not demonstrate a lack of concern for whether an injury would result, but was instead a reasonable response to a perceived threat.[3] Consequently, although there was evidence to the contrary, we are not persuaded that the evidence preponderated so heavily against the verdict that it was against the great weight of the evidence.

On cross-appeal, defendants challenge the trial court's determination that the jury's verdict that defendant Maye was not "the proximate cause" of plaintiff's injuries was against the great weight of the evidence. During defendants' closing argument, defense counsel argued that plaintiff's own negligence was the proximate cause of his injuries. Plaintiff, in turn, argued that defendants' actions were the proximate causes of his injuries. The trial court instructed the jury as follows regarding proximate cause:

> Proximate cause with regard to the conduct of the Plaintiff. The phrase a "proximate cause" means first, that the negligent conduct must have been a cause of Plaintiff's injury. And second, that the Plaintiff's injury must have been a natural and probable result of the negligent conduct.
>
> Proximate cause as it relates to the Defendants [sic]. With regard to the conduct of the Defendants, the phrase "proximate cause" means, the one most immediate, efficient and direct cause preceding an injury.
>
> There may be more than one proximate cause. You may find that each party's acts or omissions proximately caused Plaintiff's injury so long as you use the standards I just defined for you.

Because the jury did not find defendant Nelson to be grossly negligent, it did not address whether he was the proximate cause of plaintiff's injuries. The jury found that defendant Maye was grossly negligent, but that he was not the proximate cause of plaintiff's injuries. The trial court ruled that this finding was against the great weight of the evidence because plaintiff's injuries were "solely related to bullet wounds fired by the officer." Generally, we give "substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence." *Campbell, supra* at 193. However, less deference is afforded a trial court's determination that the verdict was against the great weight of the evidence. *Severn v Sperry Corp*, 212 Mich App 406, 412-413; 538 NW2d 50 (1995).

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[3] Again, as noted above, the jury could have found that defendant Nelson battered plaintiff simply by intentionally shooting him, regardless of whether it was excessive.

Here, we note that plaintiff testified that he was stopped by the police on one occasion, and then got back into his car. During cross-examination, he testified that, before driving off, he looked down on the floorboard several times. He testified that he was looking for the keys, and that he drove off after finding them. Plaintiff noted that during the ensuing chase, he went as fast as 90 miles an hour. He also testified that he drove down a dead end street, and that getting out of that predicament required him to drive over grass and curbs in a business district. He testified that he continued to flee the police, even though his tire "went flat or blew out." Ultimately, the chase ended when plaintiff's car hit a curb near an entrance to a highway.

Defendants' testimony largely corroborated these facts. However, defendants testified that after plaintiff's car became disabled, plaintiff pointed the BB gun at defendant Nelson. In contrast, plaintiff testified that he never pointed the gun at defendant Nelson. Thus, there was a material question of fact regarding whether plaintiff pointed the gun at defendant Nelson. Resolving this question of fact turned on the credibility of the witnesses. It is well established that "the determination of witness credibility is the function of the jury and not of the reviewing court." *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Here, if the jury found defendants to be the more credible witnesses regarding this particular fact, it could have found that plaintiff did, in fact, point a gun at defendant Nelson.

An argument can certainly be made that a foreseeable result from pointing a gun at an armed police officer is that the police officer will respond with deadly force. This is especially true where, as here, the person pointing the gun had already committed an armed robbery and engaged the police in a dangerous, high-speed pursuit. In other words, there was absolutely no reason for defendants to believe that plaintiff was not armed and dangerous. Under these circumstances, we conclude that there was an ample evidentiary basis for the jury to find that plaintiff pointed the gun at defendant Nelson and that, therefore, he was the proximate cause of his own injuries. Thus, the trial court erred in ruling that this finding was against the great weight of the evidence.[4] Consequently, both defendants were entitled to a verdict of no cause of action.[5]

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[4] We note that the jury found that defendant Maye was grossly negligent. Defendant Maye testified that he shot plaintiff after hearing defendant Nelson shoot at plaintiff, erroneously thinking that plaintiff was shooting defendant Nelson. Plaintiff's expert witness noted that plaintiff's gun would not have produced a muzzle flash, whereas defendant Nelson's gun would have. Thus, the jury may have found that defendant Maye's failure to realize that it was defendant Nelson shooting plaintiff was grossly negligence. However, the jury may also have concluded that the proximate cause of plaintiff's injuries was plaintiff's decision to point the gun at defendant Nelson, which caused defendant Nelson to shoot and eventually led to defendant Maye's gross negligence. Accordingly, a finding that defendant Nelson was grossly negligent, but not the proximate cause of plaintiff's injuries, would not be inconsistent.

[5] We may affirm where the trial court reaches the right result, but for the wrong reason. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001). In light of our ruling, we need not address plaintiff's contentions that the trial court erred in (i) relying on the jury's unsolicited findings; and (ii) concluding that the erroneous instruction on MCL 600.2955a was rendered moot by the jury's unsolicited findings.

Finally, plaintiff contends that the trial court erred in ruling and instructing the jury that it was improper for plaintiff's counsel to argue in a manner suggesting that the jury could draw a favorable inference (for plaintiff) from defendants' failure to present an expert witness. We note that most of the cases cited by plaintiff involved one party being able to draw a favorable inference from the other party's failure to call a known witness or present specific, existing evidence. Indeed, in those circumstances, it is reasonable to conclude that a party's failure to present such evidence means that the evidence would not have been favorable. In the instant matter, however, defendants may have determined that it was simply unnecessary to present an expert witness to bolster their testimony. If there was evidence suggesting that defendants contacted an expert witness, but failed to present the expert witness at trial, then perhaps plaintiff could have fairly commented that the absence of the expert witness entitled plaintiff to a favorable inference. In the absence of such evidence, plaintiff was not entitled to a favorable inference on the basis of these cases.

In the other case cited by plaintiff, *Grubaugh v St. Johns*, 82 Mich App 282, 289-290; 266 NW2d (1978), we noted that, although the trial court could not instruct the jury to draw a favorable inference from a party's failure to call an expert witness, it was not error for opposing counsel to argue in favor of that inference. In light of this ruling, the trial court in the instant matter may have erred in preventing plaintiff's counsel from making the argument. On the other hand, the jury was required to follow the trial court's instructions, and the jury was specifically instructed that the attorney's comments and remarks were not the law. Plaintiff does not argue, much less cite authority suggesting, that the trial court could have properly instructed the jury to draw an adverse inference from defendants' failure to call an expert witness. Further, plaintiff was permitted to argue that his expert's testimony was unrebutted. Accordingly, we are not persuaded that the trial court's error, if any, had any meaningful impact on the outcome of the trial. Consequently, we reject plaintiff's final contention of error.

In summary, we reject plaintiff's contentions of error, either on their merits or because they are moot in light of our ruling that the trial court erred in ruling that the jury's finding that defendants were not the proximate cause of plaintiff's injuries was against the great weight of the evidence.

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette